

Questions and Answers on:
Fighting the illicit trade of tobacco products
14 August 2015

A. GENERAL ISSUES

1. Why is the fight against the illicit tobacco trade a priority for the EU and Member States?

There are three main reasons:

- Member States have fiscal revenue from legal tobacco sales of over € 90 billion annually¹. At the same time, it is estimated that **smuggling costs national and EU budgets more than €10 billion** annually in lost public revenue.
- Cigarette smuggling **undermines public health policies**. Legislative restrictions and pricing policies are designed to deter smoking, not least amongst youngsters. Illicit cigarettes are available in many places, often at a substantial discount.
- The illicit tobacco trade is a main **source of revenue for organised crime**², and, in some case, terrorist groups. The new European Agenda on Security adopted by the European Commission in April 2015 recognises the need to cut off criminal groups from this revenue source.

2. What is the dimension of illicit tobacco traffic in the EU?

It is difficult to estimate the illicit tobacco market with precision. This is because - as with other illicit practices - tobacco contraband and counterfeiting are clandestine activities in constant fluctuation and change. Fraudsters go to great lengths to conceal and change patterns to escape controls.

It is important to distinguish between the main categories of "illicit" tobacco products on the EU black market, and seized by Member States:

- **contraband** (genuine cigarettes bought in a low-tax country which exceed legal import limits or acquired without taxes for export purposes but illegally re-sold on higher-priced markets);

There can be two types of contraband: first, cigarettes smuggled into the EU from third countries without taxes and duties paid in the EU; and second, cigarettes smuggled from

¹ Source: European Anti-Fraud Office (OLAF) calculations based in part on data on Member States' revenue from excise duties on tobacco sales, http://ec.europa.eu/taxation_customs/taxation/excise_duties/index_en.htm.

² Europol: <https://www.europol.europa.eu/content/page/mandate-119>

one (lower tax) EU Member State into another Member State with higher duties and taxes; this intra-EU smuggling is sometimes referred to as "bootlegging".³

- **counterfeit** (falsely branded cigarettes that are illegally manufactured and sold by a party other than the original cigarette brand owner)
- **cheap whites** (other brands bought in non-EU countries and brought into the EU for which tax and customs duties are not paid; typically there is no legal distribution network for these products in the EU).⁴

There have been cases where **legal producers within the EU** simulated fictitious exports outside the EU or carried out real exports to non-EU countries and subsequently the cigarettes were smuggled back into the EU with the aim of avoiding the applicable customs duties and taxes⁵.

- **illegal factories within the EU** produce cigarettes in EU Member States without paying the applicable taxes. These illicit cigarettes target the EU black market, with no need to smuggle them across the EU's external borders.

The Commission's 2013 strategy document on stepping up the fight against cigarette smuggling and other forms of illicit tobacco trade⁶ identified important changes in how the illicit tobacco market in the EU has developed over the last decade: whereas 15 years ago the illicit EU market was dominated by contraband from the main manufacturers smuggled in to the EU, this prevalence is declining. In contrast, today's market sees an ever-growing share of "cheap whites". According to Member States' seizure data from 2013, 8 of the 10 most seized cigarette brands were cheap whites.

According to data provided by the Member States to the Commission, the total volume of seized cigarettes in the EU was 3.1 billion in 2013 with a downward trend from 3.8 billion in 2012.

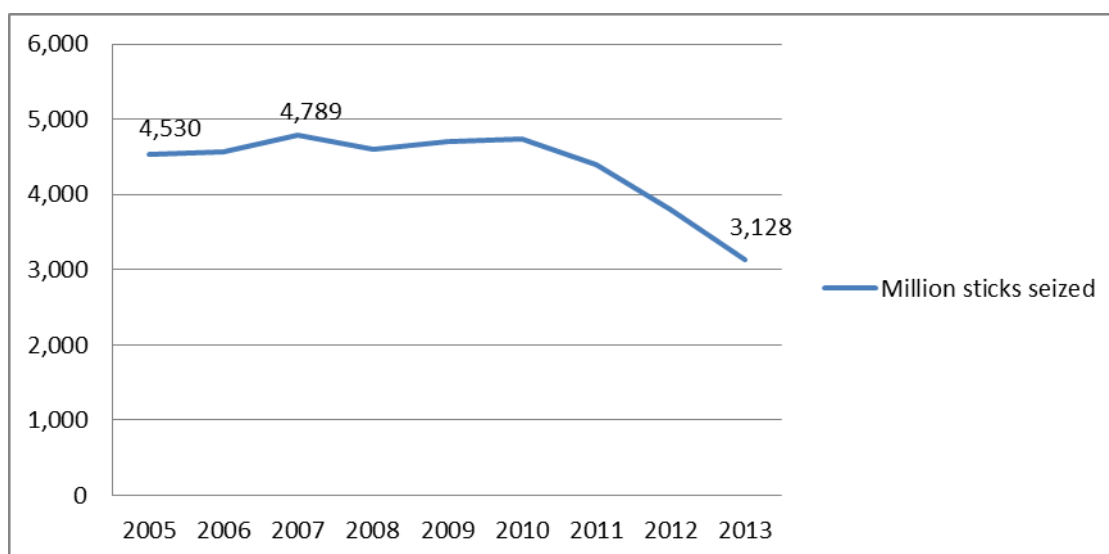
³ In view of OLAF's mandate to protect the EU's financial interests, OLAF's primary focus is on contraband cigarettes smuggled into the EU from third countries since customs duties are only due on such products (which for the most part go into the EU budget) .

⁴ In the absence of a legal definition, the term 'cheap whites' is often used with slightly different meanings. In its widest form, the term can be used to denote all cigarette brands sold illegally in the EU except those from the four major tobacco manufacturers with which the EU and Member States have concluded anti-fraud agreements.

⁵ See the example of a case of a contraband network disbanded by Italian and German law enforcement authorities with OLAF support in November 2014 http://ec.europa.eu/anti_fraud/documents/press-releases/20141208_tobacco_network_dismantled_en.pdf .

⁶ http://ec.europa.eu/anti_fraud/documents/2013-cigarette-communication/communication_en.pdf

Table: Volume of seized cigarettes as notified by Member States, in million sticks



3. What are the key elements in the EU's strategy to fight the illicit tobacco trade?

The Commission has developed a comprehensive strategy consisting of the following main components:

In 2013, the Commission presented an updated analysis of the illicit tobacco market in the EU and, based on that analysis, issued a **comprehensive strategy**⁷ to combat cigarette smuggling. To this effect, the strategy proposes specific actions in 4 key areas to efficiently tackle the illicit trade in tobacco products:

- Measures to decrease incentives for smuggling activities;
- Measures to improve the security of the supply chain (notably with the signature of the WHO FCTC Protocol);
- Stronger enforcement of tax, customs, police and border authorities (for example further joint customs operations, providing technical and financial assistance to Member States and non-EU countries to strengthen their capacities, enhance the exchange of information at EU and international level between the actors concerned especially the cooperation with major source and transit countries; setting up of a new independent laboratory for the analysis of cigarettes).
- Deterrent sanctions.

The strategy also analyses existing legislation and policies, identifies weaknesses and gaps, and proposes additional reinforced actions. It also seeks to better coordinate existing policies and tools as the fight against illicit trade is a cross-cutting issue, as well as to improve cooperation

⁷ http://ec.europa.eu/anti_fraud/documents/2013-cigarette-communication/communication_en.pdf

between the various actors at EU, national and international level. An accompanying Action Plan⁸ sets out concrete initiatives to implement the strategy.

The Commission is currently, in close cooperation with Member States, implementing this strategy. The Commission is due to review progress in implementing it in 2016.

The EU has also strengthened the **legislative framework** to fight the illicit trade of tobacco products:

- The EU's **new Tobacco Products Directive**⁹ introduces a new EU-wide system to track and trace cigarettes destined for, or placed on, the EU market. This new system involves all economic operators involved in the trade of tobacco products from the manufacturer to the last operator before the products reach the first retail outlet. Economic operators will have to record the entry and exit of all unit packets into and from their possession. Moreover, the Tobacco Products Directive obliges Member States to require that all unit packets of tobacco products carry a tamper proof security feature, composed of visible and invisible elements.
- On 4 May 2015 the Commission adopted a proposal that the EU ratifies the **Protocol to Eliminate Illicit Trade in Tobacco Products** to the **WHO Framework Convention on Tobacco Control**¹⁰ (see Section B / Questions 5 to 8).

Finally the EU strategy to fight the illicit tobacco trade is complemented by the **anti-fraud agreements** between the EU, Member States and the four major tobacco manufactures. These agreements cover more than four-fifths of EU tobacco consumption and have a global reach. The Commission is currently assessing the continued policy relevance of such contractual tools (see Questions 9 to 20).

4. What is OLAF specifically doing against tobacco smuggling?

Investigations:

OLAF carries out investigations into allegations of tobacco smuggling that causes huge losses of revenue to the EU and Member States' budgets. OLAF is the only administrative investigative body at EU level to have a mandate in this field.

In complex cross-border cases in particular, OLAF can bring significant added-value by helping coordinate anti-smuggling operations carried out by law-enforcement agencies across Europe.

OLAF works to ensure that evaded duties are recovered, criminal smuggling networks are dismantled and perpetrators brought to justice. OLAF's work is based on Article 325 'Protection of the European Union's financial interests - Fight against Fraud' of the Treaty on the Functioning of the European Union.

⁸ http://ec.europa.eu/anti_fraud/documents/2013-cigarette-communication/action_plan_en.pdf

⁹ http://ec.europa.eu/health/tobacco/products/index_en.htm

¹⁰ http://ec.europa.eu/anti_fraud/media-corner/press-releases/press-releases/2015/20150504_01_en.htm

Over the 5 years up to 2013, some 1.15 billion cigarettes have been seized by the national authorities with OLAF support alone. That is about 22 packs every minute over 5 years.

Further recent examples of such actions include:

- In April and May 2015, OLAF has contributed to the seizures of a total of 178 million cigarettes. All of these were so called 'cheap whites' (see Question 2). Unpaid duties and taxes on these cigarettes amount to an estimated EUR 35 million ([Press release N°9/2015](#)).
- In March 2015, based on information provided by OLAF and the UK's customs service (HMRC), law enforcement services in Croatia and Greece seized over 43 million smuggled cigarettes (see [Press release N°3/2015](#)).
- In Spring 2014, in three different seizures in Greece, 50 million cigarettes were seized by the Greek authorities pursuant to information transmitted to OLAF (see [Press release N°3/2014](#) and [N°7/2014](#));
- OLAF's assistance to the Spanish Customs Investigation Service in an operation in mid-September 2014 led to the dismantling of an illegal factory, the seizure of 36 tons of tobacco and cigarettes and the arrest of 18 persons;
- In November 2014, law enforcement authorities in Italy (Agenzia delle Dogane and Guardia di Finanza) and Germany (Zollkriminalamt Köln and Zollfahndungsamt Berlin) succeeded in dismantling an international tobacco contraband network. [OLAF contributed](#) to the joint efforts that led to this successful operation.

Further cases of successful action against cigarette smugglers can be found on [OLAF's website](#).

Coordination of Joint Customs Operations:

Moreover, OLAF also organises Joint Customs Operations (JCO) which bring together law enforcement authorities from EU Member States and, increasingly, non-EU countries and other entities like the World Customs Organisation or Europol. JCOs are targeted actions of a limited duration that aim to combat fraud and the smuggling of sensitive goods in certain risky areas and/or identified trade routes. OLAF has recently coordinated a number of such successful operations:

- During [Operation REPLICIA](#) of October 2014, 130 million cigarettes were seized. The Operation targeted the import of counterfeit goods by sea. Under the coordination of OLAF, customs authorities carried out targeted physical or X-ray controls on several hundred selected containers. The seizures of cigarettes alone prevented the loss of €25 million in customs duties and taxes.
- During [Operation Warehouse](#) earlier in 2014, almost 45 million smuggled cigarettes were seized by the Lithuanian Customs Service and the Lithuanian Tax Inspectorate in close cooperation with OLAF and with the participation of all 28 EU Member States.
- OLAF also led support to "Priority Control Areas" (PCA) initiated by the European Commission's Directorate-General for Taxation and Customs Union (DG Taxud), such as PCA

Dismantle which was active during 10 months in 2013 and led to the seizure of some 816 million cigarettes.

Contribution to EU tobacco anti-smuggling policy:

In addition to its investigative work, OLAF also supports the EU Institutions and Member States in shaping tobacco anti-smuggling policy, such as the Comprehensive Strategy on stepping up the fight against cigarette smuggling (see Question 3). An OLAF policy team is fully devoted to the fight against illicit tobacco trade through policy analysis and development.

B. THE WHO PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS ("FCTC PROTOCOL")

5. Why did the Commission propose that the EU ratifies the FCTC Protocol?

An effective global regime to combat the illicit trade in tobacco products is arguably the best policy response to the cross-border phenomenon of tobacco smuggling. Today, the FCTC Protocol is the main global initiative to tackle tobacco smuggling. It contains provisions on tracking and tracing (applicable 5 years after entry into force), due diligence, money laundering, sanctions and other relevant aspects.

A substantial part of the illicit tobacco products on the EU black market originate from countries outside the EU. Therefore, international cooperation in a solid legal framework is key to addressing the problem of illicit trade in Europe.

The global implementation of the Protocol, including by key transit and source countries, would effectively help curbing illicit trade. The Protocol would prompt legislation in the parties with mechanisms like tracking of tobacco products through the supply chain, provisions on money laundering and adequate punishment of criminals. These mechanisms would help authorities in the fight against illicit trade in tobacco products and would also work as a strong deterrent against criminals involved in this trade.

For all these reasons, in May 2015 the Commission adopted a proposal that the EU ratifies the Protocol to Eliminate Illicit Trade in Tobacco Products (see Question 3).

6. Who is going to implement the Protocol in the EU - the EU or the Member States?

The Protocol is a "mixed international agreement" the implementation of which will be shared by the Union and its Member States.

For example, in the area of tracking and tracing specifically, the EU Tobacco Products Directive ("TPD") of May 2014 already contains provisions which were drafted to be in conformity with the Protocol. The same applies to further implementing and delegated acts which will be adopted by the EU on the basis of the TPD.

7. What are the procedures for the FCTC Protocol to enter into force?

For the FCTC Protocol to enter into force at the international level, 40 parties are required. As of 30 June 2015 the Protocol has only 8 parties so far (Austria, Congo, Gabon, Mongolia, Nicaragua, Spain, Turkmenistan, Uruguay).

In the EU, the Commission proposal to ratify the FCTC Protocol is the first step in the EU's process to express its will to be bound by the Protocol. The proposal needs now to be adopted by the Council and find the consent of the European Parliament. The remaining EU Member States will also have to ratify or accede to the Protocol.

8. What is the Commission doing to promote the FCTC Protocol internationally?

The FCTC Protocol can only become effective if and when it is also implemented by third countries which are the main source of illicit tobacco products or are transit countries on the smuggling routes. Promoting the FCTC Protocol internationally is therefore a priority for the Commission.

The Commission is actively encouraging other countries to accede to the FCTC Protocol, and is raising this issue in many bilateral encounters.

To further promote the ratification of the Protocol in East Asia, the Commission sponsored for example a dedicated event organised by the WHO/FCTC Secretariat in Myanmar/Burma in 2014.

C. THE AGREEMENTS WITH THE FOUR MAJOR TOBACCO MANUFACTURERS

9. What are the 'tobacco agreements' and why have they been instated?

The European Union and its Member States have concluded legally binding and enforceable anti-fraud agreements with the four largest tobacco manufacturers in the EU ([Philip Morris International](#) signed in 2004 and expiring in July 2016, [Japan Tobacco International](#) signed in 2007 and expiring in 2022, [British American Tobacco \(Holdings\) Limited](#) signed in 2010 and expiring in 2030 and [Imperial Tobacco Limited](#) signed in 2010 and expiring in 2030). These agreements including all subsequent modifications are publicly available on OLAF's website.

Historically, a key concern for the EU had been the introduction of contraband and counterfeit cigarettes into the single market, causing huge revenue losses to national and EU budgets. In the 1990s, such smuggling had taken on a significant dimension and the EU was determined to combat it more vigorously. Among other actions, the EU attempted [litigation before US courts](#) against several tobacco manufacturers, including PMI. This litigation was resolved by negotiating anti-fraud agreements. One such legal action - against RJR Reynolds - is still pending before US courts.¹¹

¹¹ http://europa.eu/rapid/press-release_IP-14-476_en.htm

10. What is the objective and content of the 'tobacco agreements'?

The objective of the tobacco agreements is to reduce the presence of genuine tobacco products from the four manufacturers on the illicit EU market, as well as to combat any associated money laundering. The agreements also provide a framework to tackle the smuggling of counterfeit products.

With the agreements, the manufacturers have committed themselves to comprehensive rules concerning sales and distribution practices to promote compliance with EU and national rules as well as to ensure that their genuine cigarettes are sold, distributed, stored and shipped in accordance with all legal requirements. In essence, the agreements contain the following key elements:

- Electronic monitoring (track and trace) of the shipment of cigarettes;
- Due diligence ('Know Your Customer'): restricts sales and re-sales only to pre-approved contractors and stipulates that supply has to be commensurate with demand;
- Restriction in method of payment ensuring the payment of taxes and duties, and to prevent money laundering;
- Reporting duty: annual compliance report discussed annually at a meeting with OLAF and Member States;
- Cooperation with OLAF and Member States' law enforcement agencies;
- Financial incentives for compliance (seizure payments).

11. Will there be similar anti-fraud agreements with other tobacco manufacturers?

The EU and Member States have concluded anti-fraud agreements with the four major tobacco manufacturers in Europe. The anti-fraud agreements commit the manufacturers to costly and comprehensive disciplines to more effectively control their supply and distribution chains, to carry out due diligence on their customers, and to act against money-laundering (see previous Question).

The Commission has in the past signalled readiness to discuss similar arrangements with other relevant manufacturers in the sector in order to fight the illicit tobacco trade. However, so far no manufacturer has expressed interest in doing so.

12. What is the relation between the tobacco anti-fraud agreements and the EU Tobacco Products Directive (TPD)?

The regulatory environment for tobacco control in the EU has evolved since the signing of the tobacco agreements. At the European level, the TPD imposes an EU-wide system of tracking and tracing of products destined for or produced in the EU market. At the global level, once the FCTC Protocol is implemented it will further strengthen the EU legislative framework with the provision of a global solution to a global problem, even if this new solution will only gradually make an impact on smuggling activity (see above Question 7).

The tobacco agreements continue to support this evolving legislative framework and they have preceded some of the above-mentioned regulatory provisions. In any case, the agreements foresee that any EU or national law automatically takes precedence.

13. How many cigarettes have been seized under the agreements¹²?

Table 1: Total PMI cigarettes seized, as reported by Member States to the Commission (OLAF) under the Agreement, broken down by genuine and counterfeit, 2006-2014 (in million)

Date of seizure	Total genuine	Total counterfeit
2006	116.09	403.2
2007	99.1	410.58
2008	76.49	157.6
2009	121.2	360
2010	58.76	359.85
2011	26.16	208.41
2012	21.09	102.79
2013	15.54	100.42
2014	13.55	89.04
Grand Total	547.98	2191.89

Table 2: Total BAT cigarettes seized, as reported by Member States to the Commission (OLAF) under the Agreement, broken down by genuine and counterfeit, 2010-2014 (in million)

Year	Total genuine	Total counterfeit
2010	36.31	3.69
2011	49.74	6.37
2012	59.94	3.43
2013	24.46	8.58
2014	3.98	
Grand Total	174.46	22.08

¹²Member States are still in the process of reporting figures for seizures made in 2014 or earlier

Table 3: Total JTI cigarettes seized, as reported by Member States to the Commission (OLAF) under the Agreement, broken down by genuine and counterfeit, 2007-2014 (in million)

Year	Total genuine	Total counterfeit
2007	0.25	0
2008	7.12	9.42
2009	27.08	30.87
2010	34.91	73.66
2011	21.52	9.44
2012	21.22	9.2
2013	15.99	23.5
2014	8.27	5.2
Grand Total	136.36	161.3

Table 4: Total ITL cigarettes seized, as reported by Member States to the Commission (OLAF) under the Agreement, broken down by genuine and counterfeit, 2010-2014 (in million)

Year	Total genuine	Total counterfeit
2010	1.87	-
2011	5.39	0.01
2012	15.42	32.86
2013	11.38	27.14
2014	5.61	20.07
Grand Total	39.67	80.09

14. What are the overall payments received from manufacturers?

The agreements provide for annual payments and for additional payments ("seizure payments") in the case of seizures of manufacturers' genuine products by law enforcement agencies.

The total amounts of **annual payments** have been agreed in advance with each manufacturer at the moment of concluding the agreements and are as follows (in US\$) for the entire duration of the respective agreements:

- PMI: 1.25 billion
- JTI: 400 million
- ITL: 300 million
- BAT: 200 million

After deduction of legal fees, Member States receive 90.3% of annual payments and the general EU budget receives 9.7%.

Seizure payments come into play when genuine cigarettes produced by the manufacturers are seized and the number of cigarettes is above a certain threshold. In these cases, the EU budget receives on average around 5% (the level of the contribution depends on the Member State of seizure), and the seizing Member State receives the rest.

As of June 2015, the overall payments received from manufacturers are as follow:

- Annual instalments: € 1.346.899.492
- Seizure payments: €88.484.042

15. Where do the payments go?

The payments received by the EU general budget are not earmarked, in line with the principle of the universality of the EU budget.

The payments going to the Member States are transferred to their budgets. The Commission does not monitor the use of these funds by the Member States.

The Commission and OLAF encourage Member States to use part of their annual budgets to boost the fight against illicit tobacco trade. At Commission level, for example, the Hercule Programme is used to support Member States fight fraud, corruption and other illegal activities. The new anti-fraud Programme Hercule III entered into force in March 2014 and it will make available an amount of EUR 104.9 million of support for the period 2014-2019. Hercule helps finance concrete projects such as the purchase by national authorities of x-ray scanners and other technical equipment to stamp out smuggling and other criminal activities against the EU's financial interests.

16. How is it determined whether a seized cigarette is a genuine or counterfeit one?

Under the four cooperation agreements, seizure payments are due depending on whether cigarettes seized with the brand of a given manufacturer are deemed to be genuine (payment), or counterfeit (no payment). This analysis is carried out by the manufacturers but Member States and the EU can do random checks to verify the findings.

There has been no evidence of incorrect reporting, and if there had been, the Commission would without doubt have contested a false determination via the designated laboratory foreseen by the various agreements. However, it goes without saying that adequate control mechanisms need to be in place to minimise any risk of false determinations by the manufactures.

Member States' customs services have built up special expertise in the tobacco sector. Under the four agreements, more than 5000 seizures have been notified, and many more seizures take place on a daily basis outside the agreements. Customs officers regularly investigating tobacco smuggling can often determine themselves whether a given sample is likely to be counterfeit or not. Some Member States have also tasked their national customs laboratory with verifying the authenticity of seized cigarettes.

At the European level, the Commission had in past years used an independent laboratory in the United Kingdom to test seized cigarettes. The Commission is now setting up a new facility for the testing of seized cigarettes. To this effect, the Commission's own laboratory in the Joint Research Centre in Geel (BE) will be used, in close cooperation with Member States' customs laboratories.

17. What is the "baseline" amount for seizures?

If the 'baseline amount' agreed in the tobacco agreements has been exceeded in a calendar year, an additional seizure payment equal to 4 times the initial seizure payment made on any qualifying seized cigarettes in excess of the baseline total would be due. The agreed baseline figures for JTI, ITL and BAT have remained the same since the entry date of these agreements.

The baseline figure for PMI has been modified since the entry into force of the PMI Agreement to take account of the Member States that joined in or after 2004. Originally, the definition of the baseline amount in Section 1.01 of the PMI Agreement distinguished between Member States who were Member States of the EU before 1 January 2004 (EU15) and "new" Member States which acceded to the EU after that date. Only the former had immediate access to seizure payments, while the latter were provided progressive access to such payments.

The original baseline figure of 90 million represented a calculation of half of the total combined contraband PMI cigarettes seized during a reference period. Since that date 13 additional countries have joined the EU. All 28 Member States have now signed the PMI Agreement. This is in sharp contrast to the original 10 Member States that were signatories. When calculating the revised baseline amount for PMI, reference was made to the parameters used for determining the baseline amounts in the subsequent agreements with the other tobacco manufacturers.

18. Are the anti-fraud agreements compatible with the WHO Framework Convention on Tobacco Control?

Article 5.3 of the WHO Framework Convention on Tobacco Control (FCTC) calls on the Parties to protect their public health policies from commercial or vested interests.

The WHO FCTC Guidelines about the implementation of Article 5.3 FCTC contain an exemption for legally binding and enforceable agreements, such as the EU's tobacco agreements.

19. Will there be a prolongation of the 2004 Agreement with Philip Morris International?

The Commission has not yet decided whether or not to seek a prolongation of the PMI Agreement, and to start negotiations with PMI to this effect. No negotiations have taken place with PMI. As contracting parties, the Member States will also have to take a position. The Commission will also keep the European Parliament informed of any relevant developments.

Exploratory talks with PMI, as required under clause 11.02 of the PMI Agreement, confirmed PMI's interest in a prolongation of the Agreement.

20. Has the Commission assessed if the Agreement has met its objectives before considering a possible renewal?

The services of the Commission are currently evaluating the experiences made with the PMI Agreement. The Commission will also consider whether such contractual instruments are still relevant policy tools to meet the needs of stakeholders, whilst remaining coherent with the developing EU policy framework.

21. How has the volume of PMI products evolved since the agreement was signed?

The volume of genuine and counterfeit PMI products seized by Member States has fallen by more than 85% since 2006. This figure holds irrespective of whether one is looking only at genuine or also at counterfeit products.

Table 5. Total PMI cigarettes seized, as reported by Member States to the Commission (OLAF) under the Agreement, broken down by genuine and counterfeit, 2006-2014

